SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: June 13, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV364502	RFA Consulting LLC et al. v. Boosted, Inc.	Order of examination: parties to appear.
LINE 2	22CV408721	Bret Meek et al. v. Doe 1 et al.	Click on LINE 2 or scroll down for ruling.
LINE 3	23CV428263	Citibank, N.A. v. Yulia Morsey	Motion to quash service of summons: plaintiff acknowledges the need for defendant to be served again and expressly does not oppose the motion. Accordingly, the court GRANTS the motion.
LINE 4	22CV404046	Dolores Raposas v. Wayne Lammer et al.	Click on LINE 4 or scroll down for ruling.
LINE 5	23CV413621	Diamond Elevator, Inc. v. John Construction, Inc.	Motion to compel further responses to requests for production of documents, and request for sanctions: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. In addition, the court GRANTS IN PART plaintiff's request for monetary sanctions, in the amount of **$2,160** (three hours at $700/hour plus the $60 filing fee). Defendant shall produce the documents at issue and pay monetary sanctions to plaintiff within 30 days of notice of entry of this order.
LINE 6	23CV413621	Diamond Elevator, Inc. v. John Construction, Inc.	Motion to compel compliance with the court's prior discovery order, and request for sanctions: notice is proper, and the motion is unopposed. Good cause appearing, the court GRANTS the motion. In addition, the court GRANTS IN PART plaintiff's request for monetary sanctions, in the amount of **$1,460** (two hours at $700/hour plus the $60 filing fee). Defendant shall provide the outstanding discovery responses and pay monetary sanctions to plaintiff within 30 days of notice of entry of this order.

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LINE #	CASE #	CASE TITLE	RULING
LINE 7	2010-1-CV-167433	First Resolution Investment Corp. v. Michael A. Sagastume	Claim of exemption: the claim is DENIED, as the judgment creditor's request for "20% of the Debtor's net disposable income per pay period for payment on account of this debt" is reasonable, and judgment debtor has not shown that this amount is exempt. Although it appears that the judgment debtor has substantial loans from a number of other creditors, the debt at issue here has priority over these other debts.
LINE 8	2012-1-CV-236649	Unifund CCR, LLC v. Hanh-Dung M. Le	Claim of exemption: the claim is DENIED. Judgment debtor has failed to demonstrate the application of any statutory exemption to the amount of this judgment. Judgment debtor's primary contention appears to be that the judgment from May 21, 2013 is invalid for "a lack of due process." This is not a proper basis for a claim of exemption.
LINE 9	23CV411530	Marcy McCarrell v. Goodwill of Silicon Valley, LLC et al.	Motion to set aside dismissal: for good cause shown, the court GRANTS the motion under CCP § 473(b). Given the age of this case, plaintiff needs to serve the summons and complaint forthwith. The court will calendar this matter for an OSC re: dismissal for failure to serve the summons and complaint on **October 17, 2024** at 10:00 a.m. in Department 10.
LINE 10	23CV424738	Fuel Logic, LLC v. Ryan Peacock, Inc. et al.	OFF CALENDAR
LINE 11	24CV430080	Discover Bank v. James Coberly	Motion to compel arbitration: parties to appear. There is no proof of service of the motion, and a default has now been entered against the defendant. Unless it can be shown that notice is proper, this motion will have to be taken off calendar.

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Calendar Line 2
Case Name: *Bret Meek et al. v. Doe 1 et al.*
Case No.: 22CV408721

I. BACKGROUND

This action arises from alleged childhood sexual assault, filed by Plaintiffs Bret Meek and Scott Rodvold (collectively, "Plaintiffs") against a school district in Santa Clara County and a former employee of that district (collectively, "Defendants"), whom Plaintiffs have designated as Doe 1 and Doe 2, respectively.

Plaintiffs filed their original complaint on December 16, 2022. They filed a first amended complaint ("FAC") on May 5, 2023. The FAC stated causes of action for: (1) Sexual Assault of a Minor (alleged against Doe 2 only, who was referred to as "Perpetrator"); and (2) Negligence of District and Employees under Government Code section 815.2 (alleged against Doe 1 only). Plaintiffs alleged that the sexual abuse and assaults took place during the 1973-1974 school year and that some of the alleged sexual abuse of Rodvold and all of the alleged abuse of Meek took place off campus. (See FAC, ¶¶ 15-30.)

Defendant Doe 1 (hereinafter, the "District") demurred to the FAC, and on January 23, 2024, the court: (1) overruled the demurrer to the FAC to the extent that it was based on the notion that Assembly Bill 218 (which removed the statutory time bar for childhood sexual assault claims) was unconstitutional, and (2) sustained the demurrer to the second cause of action as brought by Meek on the ground that the District was immune from liability for Doe 2's off-campus acts under Education Code section 44808.[1] The court granted leave to amend the second cause of action.

Plaintiffs filed the operative second amended complaint ("SAC") on January 26, 2024. It asserts the same two causes of action. Currently before the court is another demurrer by the District to the second cause of action as alleged by Meek.

II. DEMURRER TO THE SAC

A. General Standards

The court, in ruling on a demurrer, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. California Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 [citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318].) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) A plaintiff is not ordinarily required to allege "'each evidentiary fact that might eventually form part of the plaintiff's proof . . . .' [Citation.]" (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1341.)

[1] The court takes judicial notice of the January 23, 2024 order on its own motion under Evidence Code section 452, subdivision (d). The court overruled the demurrer to the second cause of action as to Rodvold, given that some of the allegations of sexual assault on Rodvold occurred on school grounds.

The court considers only the pleading under attack, any attached exhibits, and any facts or documents for which judicial notice is properly requested. Where, as here, a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034 (*Berg & Berg*) [internal quotations omitted]; see also *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer"]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].) "While inconsistent theories of recovery are permitted, a pleader cannot blow hot and cold as to the facts positively stated." (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449, internal citation omitted.)

The court cannot consider extrinsic evidence in ruling on a demurrer. The court has only considered the declaration of Morgan Hansen to the extent it discusses the meet-and-confer efforts required by statute. The court has not considered the attached exhibit.

Code of Civil Procedure section 430.60 states, "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are taken. Unless it does so, it may be disregarded." The California Rules of Court also require that the demurrer itself (distinct from a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

B. The Basis for the District's Demurrer

As noted above, the District again challenges the second cause of action on the ground that "Meek has failed to allege facts sufficient to maintain a negligence cause of action against the District because [Education Code] section 44808 provides it complete immunity as the alleged assaults occurred off campus. The perpetrator's alleged sexual assault of Meek undeniably occurred off campus in the perpetrator's private residence without the authority or knowledge of the District." (Notice of Demurrer and Demurrer, p. 2:1-5.)

C. The Merits of the District's Demurrer

1. Public Entity Liability and Education Code section 44808

As discussed in the court's prior demurrer order, "Except as otherwise provided by statute . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (Gov. Code, § 815, subd. (a).) Under section 815.2, a public entity *is* liable for injury "proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2, subd. (a).) "In the context of public schools, the Legislature has established different liability rules for injuries occurring

during required school-sponsored, off-premises activities, on the one hand (Ed. Code, § 44808), and field trips or excursions on the other hand (Ed. Code, § 35330)." (*Myricks v. Lynwood Unified Sch. Dist*. (1999) 74 Cal.App.4th 231, 238.)

Education Code section 44808 "renders a school district not 'responsible or in any way liable for the . . . safety of any pupil . . . at any time when such pupil is not on school property' unless the district has 'undertaken to provide transportation for such pupil to and from the school premises,' 'undertaken a school-sponsored activity off the premises,' 'otherwise specifically assumed responsibility or liability' or 'failed to exercise reasonable care under the circumstances.'" (*Wolfe v. Dublin Unified School Dist.* (1997) 56 Cal.App.4th 126, 130.) In other words, Section 44808 "grants a district immunity unless a student was (or should have been) directly supervised during a specified undertaking." (*Id*.) For the purposes of section 44808, "a school-sponsored activity" is defined as an activity "that requires attendance and for which attendance credit may be given." (*Castro v. Los Angeles Bd. of Education* (1976) 54 Cal.App.3d 232, 236, fn. 1 (*Castro*).) In the event that one of the foregoing circumstances is found, the school district "shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board." (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1353 (*Cerna*) [quoting section 44808].)

Section 44808 "has been interpreted as imposing liability on school districts for a student's off campus injury only when 'the student is involved in activities supervised or undertaken by the school.'" (*LeRoy v. Yarboi* (2021) 71 Cal.App.5th 737, 743 (*LeRoy*) [internal citation omitted].) "In fact, the 'consensus of decisions from the Court of Appeal is that "section 44808 limits the liability of schools for after-hours, off-campus activity, absent a specific undertaking"' by the school during which a student is injured." (*Ibid*., quoting *Cerna, supra,* 161 Cal.App.4th at p. 1356.) "Thus, with one exception, every court since *Hoyem* . . . 'has interpreted section 44808 to provide that school districts are not responsible for the safety of students outside school property absent a specific undertaking by the school district and direct supervision by a district employee.'" (*Ibid.* [internal citation omitted].) The court of appeal in *LeRoy* ultimately concluded: "We agree with the great weight of authority that section 44808 'grants a district [and its employees] immunity [for a student's injuries] unless [the] student was (or should have been) directly supervised during a specified undertaking.' We in turn agree that '[t]he portion of section 44808 that refers to failing to exercise reasonable care' that the LeRoys rely on 'does not create a common law form of general negligence; it refers to the failure to exercise reasonable care during one of the [three] mentioned undertakings' in section 44808.'" (*Id.* at pp. 743-744 [internal citations omitted].)

2. Parties' Arguments

The District argues that Education section 44808 provides it a complete defense because "the SAC's allegations regarding the alleged assault of Meek fail to articulate how Meek's presence at the perpetrator's private residence was part of a school-sponsored activity or any other circumstance in which the school would have specifically assumed responsibility or liability . . . [N]oticeably [absent] from the SAC is any fact which demonstrates that District knew or should have known that the perpetrator would take Meek to his own private residence. In fact, the allegations clearly suggest that the perpetrator deviated from his personal promise to take Meek home when he elected to 'make a stop' at his private residence . . . . [T]he off-campus assault of Meek by the perpetrator should not create liability for the school district

because there is no evidence that (1) the District undertook for Meek to be in the perpetrator's apartment; or (2) that Meek and the perpetrator were together at the perpetrator's apartment due to a school-sponsored activity; or (3) that the District specifically assumed any responsibility for what happened when they were at the perpetrator's private apartment." (Memorandum, pp. 4:26-5:15.)

The opposition contends that "two exceptions" to Education section 44808 "have been met: (1) Perpetrator, acting as an employee of the District, and in the scope of his employment, undertook to provide transportation to and from school premises, and (2) Perpetrator, acting as an employee of the District and in the scope of his employment, undertook school-sponsored activity off-premises." (Opposition, pp. 1:26-2:2.)

3. Analysis

The court sustains the District's demurrer to the SAC's second cause of action on the ground that the District is immune from liability under Education Code section 44808 for Doe 2's off-campus actions as to Meek.

The second cause of action itself (SAC, ¶¶ 48-50) consists of conclusory, boilerplate statements that are insufficient on their own to state a cause of action, particularly one alleging a statutory violation under Government Code section 815.2. The general rule is that statutory causes of action must be pleaded with particularity. (See *Lopez v. Southern California Rapid Transit District* (1985) 40 Cal.3d 780, 795; *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 790.) Determining whether section 44808 provides immunity to the District requires a closer examination of the allegations regarding Doe 2's ("Perpetrator's") interactions with Meek that are incorporated by reference into the second cause of action.

The original complaint alleged (at ¶ 32) that "Perpetrator told Meek he was looking for someone to help him videotape sports games at IS. Perpetrator made arrangements for both Perpetrator and Meek to videotape a school event. Perpetrator picked up Meek from his house and planned to drop Meek home after the event. After the event, on the way to home, Perpetrator told Meek they needed to stop by Perpetrator's house." The FAC alleged (at ¶ 28) that "Perpetrator executed a plan to get Meek to his residence with the intent to molest him. Perpetrator arranged for both Perpetrator and Meek to videotape a school event. Perpetrator was to provide transportation from Meek's residence to and from the event. After the event, Perpetrator told Meek they needed to stop by Perpetrator's residence."

The SAC now alleges: "Approximately one week after their initial interaction, Perpetrator executed a plan to lure Meek to his residence with the intent of molesting him. In executing the plan Perpetrator (1) undertook to provide transportation from school to Meek's home, and (2) assumed responsibility for Meek while Meek was in the care of Perpetrator during an after-school activity. Utilizing his authority as the librarian of IS, as a faculty member of IS, and as an employee of Doe 1 District, Perpetrator invited Meek to assist in filming a school sporting event with Perpetrator. The sporting event was located on school property. Meek was told that filming the sporting event was for the school and that Perpetrator 'videotaped all the games.' Perpetrator said that he videotaped all school events as part of his job responsibilities for IS. After his classes finished, Meek waited for Perpetrator in the library. After some time, Perpetrator drove Meek from the school parking lot and Perpetrator took Meek to a burger restaurant. After eating, [Perpetrator] drove Meek back to the gym at IS

where Meek and Perpetrator filmed the sporting event together using the school's video-audio equipment. As part of the plan to film the sporting event together, Perpetrator told Meek that he would drive him home afterwards and specifically promised to provide transportation home. After the sporting event, Perpetrator informed Meek that they needed to make another stop at Perpetrator's residence." (SAC, ¶ 28.)

The District is correct that these allegations describing Doe 2's "plan to lure Meek to his residence with the intent of molesting him" cannot be interpreted as alleging that Meek was injured during an off-campus school-sponsored activity. As noted above and in the court's prior order, for purposes of Education Code section 44808, "a school-sponsored activity" is defined as an activity "that requires attendance and for which attendance credit may be given . . . ." (*Castro, supra,* 54 Cal.App.3d at p. 236.) Thus, the entirety of the allegations in paragraph 28 of the SAC—other than the filming of a sporting event *on campus*—appear to fall outside the scope of the school's responsibility. Section 44808 provides "'that school districts are not responsible for the safety of students outside school property absent a *specific undertaking* by the school district and direct supervision by a district employee,'" (*LeRoy, supra,* 71 Cal.App.5th at p. 743 [internal citation omitted; emphasis added]), and there is no allegation here that the school undertook to provide transportation for Meek to and from his home for an *on-campus* activity. Doe 2's promises of transportation to Meek are presented in the SAC as his own personal promises—as part of his plan to "lure" Meek to his home—rather than an undertaking by the District to provide transportation to or from an on-campus sporting event. Moreover, even if the allegations of paragraph 28 could be construed as alleging a specific undertaking *by the school or by the District* to provide transportation to and from Meek's home, rather than by Doe 2 personally, there is no allegation that the school undertook the responsibility of ensuring that the employee providing that transportation would not intentionally *interfere* with that transportation by instead taking Meek to his private residence and then engaging in a criminal act completely unrelated to that transportation.

To the extent that Meek contends that one of the exceptions to immunity under section 44808 is a general undertaking "to exercise reasonable care," this is directly contrary to *LeRoy, supra*. General allegations that the District negligently supervised Doe 2 when he was on school property (see SAC, ¶¶ 10-12, 31-33) are irrelevant to the applicability of section 44808 immunity for Doe 2's actions off school property. (See *LeRoy, supra,* 71 Cal.App.5th at 743-744.) Indeed, such an overbroad reading would allow the exception to swallow the rule and nullify any immunity afforded by section 44808 in its entirety.

The court denies further leave to amend the second cause of action. "The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case." (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145.) Here, the opposition does not even request further leave to amend, much less describe how the foregoing defects could be cured. (Opposition at p. 7:16.) The court discerns no potentially effective amendment that would not contradict the factual allegations in the original complaint, FAC, and SAC.

The demurrer to the second cause of action is SUSTAINED as to Meek WITHOUT leave to amend.

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Calendar Line 4
Case Name: *Dolores Raposas v. Wayne Lammer et al.*
Case No.: 22CV404046

I. BACKGROUND

This premises liability action arises from plaintiff Dolores Raposas's slip and fall on October 30, 2021 at the home of defendant Connie Stewart at 2228 Shiloh Avenue in Milpitas, California (the "property").

The original and still-operative complaint, filed by Raposas on September 2, 2022, does not contain any labeled causes of action. It alleges that Stewart and another individual, Wayne Lammer, owned and controlled the property. (Complaint, ¶ 3.)[2] Raposas was an invited guest on October 30, 2021. (*Id.* at ¶ 5.) The complaint goes on to state that "Defendants, and each of them, did so negligently, carelessly and imprudently manage, maintain, operate, and control the premises so as to cause, permit and allow a dangerous and defective condition to exist and remain, in on, or about the said premises, and as a direct and proximate result of the Defendants' negligence in failing to ensure inter alia, adequate lighting on or about the Premises as a result, the Plaintiff was caused to fall in and about the said Premises." (*Id.* at ¶ 7.) The fall allegedly resulted in unspecified "disabling, serious and permanent injuries, and pain, suffering and mental anguish[.]" (*Id.* at ¶ 9.)

Currently before the court is Stewart's motion for summary judgment, filed on March 12, 2024. Raposas filed her opposition on May 30, 2024, and Stewart filed her reply on June 6, 2024.

II. STEWART'S MOTION FOR SUMMARY JUDGMENT

A. Legal Standards for Summary Judgment/Adjudication

The pleadings limit the issues presented for summary judgment/adjudication, and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].) The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code of Civil Procedure ["CCP"] §437c, subdivision (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

[2] Lammer has since been dismissed from the case.

While the same standards of admissibility govern both, opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) "Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise additional theories of liability. '[S]ummary judgment cannot be denied on a ground not raised by the pleadings. [Citations.]'" (*Nativi v. Deutsche Bank National Trust Co*. (2014) 223 Cal.App.4th 261, 290, internal citation omitted; see also *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3 ["[a] party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings"].)

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action . . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; internal citations omitted.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable finder of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379 [internal quotation marks and citations omitted]; see also *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 479 [because speculation is not evidence, speculation cannot create a triable issue of material fact].)

B. Legal Standards for Premises Liability

"Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties. [Citation.]" (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1.) "Premises liability is a form of negligence . . . and is described as follows: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619; see also CACI 1001 [stating in part: "A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/ controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others."].)

There is also a separate notice requirement: "An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. An injured plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it, but failed to take reasonable steps to do so." (*Howard v. Omni Hotels Management Corp*. (2012) 203 Cal.App.4th 403, 431 [citations omitted].) "Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous

condition, evidence of another similar accident must have occurred under substantially the same circumstances." (*Id*. at p. 432.)

"An owner of real property is 'not the insurer of [a] visitor's personal safety . . . .' However, an owner is responsible 'for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property . . . .' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition,' and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944 [internal citations and quotation marks omitted].) "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable [person] in view of the probability of injury to others." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156.)

With regard to a landowner/possessor/lessor/controller's obligations, "if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner [or possessor/lessor/party in control] is under no further duty to remedy or warn of the condition." (*Krongos v. Pacific Gas & Electric Co*. (1992) 7 Cal.App.4th 387, 393.) The determination of whether a particular danger is open and obvious rests upon an objective standard. (*Bunch v. Hoffinger Industries, Inc*. (2004) 123 Cal.App.4th 1278, 1295-1298.) Thus, the inquiry is whether the dangerous condition is obvious to a reasonable person, not the plaintiff in particular. (*Ibid*.; see, e.g., *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 126-127 ["Any reasonable person would know that standing within a few feet of a high speed freight train is dangerous."].)

C. Analysis

The court GRANTS the motion for summary judgment for the reasons that follow.

Stewart's moving papers provide significant additional undisputed facts regarding the incident that were not mentioned in the complaint. Specifically, the parties agree that Raposas was leaving Stewart's house with bags full of leftover food when she descended a walkway containing stairs leading out of the house. At that time, 11:45 p.m., the possible sources of illumination included a streetlight and a motion-activated light positioned outside Stewart's doorway. Stewart contends and Raposas does not dispute that the motion-activated porch light was already present on the outside of the house when Stewart's control of the property began. (See Undisputed Material Fact ("UMF") 6.)

Raposas asserts that the light was not on at the time she began going down the stairs. According to Raposas, Stewart's husband, Michael Wheeler, told her that the motion-activated light had not turned on and he began waving his arms in front of the sensor in order to get it to illuminate. (UMF 28.) Despite the knowledge that the light was not on, Raposas continued to go down the stairs until she fell on the very last step. (UMF 29.) It is undisputed that the light was on when Raposas awoke on the ground after the fall. (UMF 31.) Raposas's theory of the case is that the light was not on, causing her to miss the last step, but even if the light had been on, it provided insufficient illumination and, therefore, created a dangerous condition.[3]

[3] Stewart correctly points out that the only dangerous condition alleged in the complaint is the lack of illumination on the premises. Raposas confusingly asserts: "There is a contention in Defendant's motion that inadequate lighting is the only condition of the property alleged to be dangerous. This is a mischaracterization of the

Stewart contends that if the light was off, the dangerous condition was open and obvious. Raposas should not have started down the stairs knowing that the light was not yet on (and knowing that Wheeler was waving his arms to get them to turn on). Further, the undisputed evidence shows that the motion-sensor light was functioning that evening, and Stewart had no notice that it was not. If, on the other hand, the light was on, Stewart had no knowledge that the light provided insufficient illumination. To the extent that Raposas's case is based on the adequacy of the lighting, Stewart concedes that she had a duty to ensure adequate lighting.

In opposition, Raposas contends that there is a triable issue of fact as to whether the light was on at the time of her fall. She also maintains that even if the light had been on, there is a triable issue of fact as to whether it provided sufficient illumination. Finally, she argues that the dangerous condition was not open and obvious.

1. If the Light Was Off, the Dangerous Condition Was Open and Obvious

The court will first address the contention that, if the light was off the entire time before Raposas's fall, as she claims, the dangerous condition was open and obvious such that Stewart cannot be held liable, as Raposas continued *knowingly* to walk down the stairs in the dark. This argument is well taken. "'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' [Citation.] In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition. [Citation.]" (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 (*Jacobs*).)

Raposas asserts that the light was off the entire time she descended the stairs—from the very top to the very last step on the bottom, where she fell. (UMFs 24, 27.) While Raposas was halfway down the stairs, she claims that she stopped because Wheeler mentioned that the light was not turning on. (UMF 28.) She turned around and saw him waving his arms to turn the light on. (UMF 28.) Nonetheless, Raposas continued to proceed down the steps despite the fact that the light was allegedly still not on. (UMF 29.)

Stewart asserts that there was no necessity requiring Raposas to proceed down the stairs at that moment, rather than waiting for the light to turn on. (UMF 33.)[4] She cites *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 999 (*Castellon*), which the court agrees is factually analogous. In *Castellon*, the plaintiff tripped on stairs as a result of insufficient lighting, even though there was a functioning light fixture available to be turned on, a resident had told the plaintiff to turn it on before leaving the house, and the plaintiff did not turn it on simply because she could not find the switch. (*Id.* at pp. 998-999.) The Court of Appeal determined

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pleadings. It is the totality of the mechanism of the injury, i.e.. a misstep from a step *because of* inadequate limiting, that was alleged in Plaintiff's complaint: '[A]s a direct and proximate result of the Defendants' negligence in failing to ensure inter alia, adequate lighting on or about the Premises as a result, the Plaintiff **was caused to fall** in and about the said Premises.' Plaintiff's Complaint on file with the Court, at ¶ 7 (emphasis added)." (Opposition, p. 9, fn. 3 [emphasis in original].) Notwithstanding the verbal contortions in this passage, it does not allege any dangerous condition on the premises other than inadequate lighting.

[4] Raposas objects to this UMF as argumentative. The court overrules this objection.

that summary judgment was appropriate under the circumstances because the plaintiff "chose to exit in the dark." (*Id*. at p. 999.)

Here, similarly, Raposas contends that the porch light was not on as she descended the stairs, but it is undisputed that it was on when she regained consciousness after her fall. (UMF 31.) It is further undisputed that it had worked on every other instance when Raposas had visited in the past. Specifically, Stewart explains that Raposas had visited the property twice a month since 2015 and used the walkway with the stairs at nighttime on multiple occasions. (See UMFs 5, 14, 15, 16, 17.) Every time, other than the night of the incident, Raposas used the walkway at night, and the motion-sensor porch light turned on. (UMFs 22, 25.)[5] Raposas asserts that she expected that the light would turn on. Thus, just as in *Castellon*, liability cannot extend to Stewart for Raposas's deliberate and knowing choice to continue down the stairs in the dark.

Raposas also contends that even if the light had been on, its level of illumination was insufficient to render the stairway safe. Both Raposas and Stewart provide expert declarations as to the level of illumination provided by the porch light. But Raposas's theory of the case is that the light was off at all relevant times. Thus, if Raposas's sworn deposition testimony that the light was off is to be accepted, then the fact that the level of light may have been insufficient when the light was illuminated could not have caused Raposas's injury, and Stewart cannot be held liable on that theory.

Moreover, even if the court were to accept the alternate theory that the porch light was *on* and provided insufficient illumination—*e.g.*, Wheeler testified at his deposition that the light was on from the time he opened the door to walk Raposas out of the house (Plaintiff's Further Material Facts ("PFMF") 64)—as Stewart points out, and as discussed below, Raposas fails to tie this alleged insufficiency of the porch light's luminosity to any *notice* to Stewart of an allegedly dangerous condition.

2. Stewart Has Met Her Burden of Showing She Had No Notice of the Dangerous Condition, and Raposas Has Not Shown a Triable Issue of Material Fact on this Point

Stewart has met her burden of showing that she had neither actual nor constructive notice of any dangerous condition on the property. As noted above, Stewart has presented undisputed evidence that the light illuminating the stairs was working on every previous occasion when Raposas had come to visit, and that it was on immediately after Raposas's fall that same evening. Raposas also admits that no person had complained to Stewart regarding insufficient illumination from the porch light on any occasion prior to the incident. (UMF 23.) This is sufficient to show that Stewart had no notice of any dangerous condition with respect to the porch light.

In opposition, Raposas confusingly argues that it is undisputed that Raposas had actual notice of the dangerous condition because she occupied and controlled the premises and

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[5] This UMF states, "Every time Plaintiff left the Property at night the porch light was on and functioning properly." (UMF 22.) Raposas disputes this UMF only to the extent it suggests that the light was functioning properly on the night of her fall. (See Plaintiff's Response to UMF 22.)

because Wheeler was outside with Raposas at the time of the incident and waved his arms to activate the motion sensor. This argument is unavailing. Raposas does not explain how Wheeler's knowledge of the lack of activation in the light at the moment of the incident could be imputed to Stewart, who is not alleged to have been outside and seen whether the light was on. Further, under Raposas's theory, Stewart would not have had sufficient opportunity to cure the dangerous condition because Raposas continued to proceed down the stairs despite the fact that the light was not on. Thus, to the extent the dangerous condition was allegedly caused by the light being either "*off*" *that night* or "*on*" *that night but insufficient*, Raposas has failed to show that Stewart had notice of the dangerous condition with sufficient time to cure it. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1203 ["The plaintiff has the burden to prove the owner had actual or constructive notice of the defect in sufficient time to correct it."].)

In Raposas's response to Stewart's separate statement, she also appears to argue that Stewart had notice of the dangerous lack of illumination of the stairs because Stewart herself had fallen on them previously. But even crediting Raposas's deposition testimony that Stewart told her that she had previously fallen on the stairs, Raposas has provided no evidence that Stewart fell on the stairs *as a result of the lack of illumination—i.e.*, the dangerous condition that Raposas alleges here in her complaint. The relevant testimony is as follows:

> Q. Okay. Prior to this incident happening, had anyone ever told you that they fell on the walkway?
>
> A. Yes.
>
> Q. Who told you that they fell on the walkway?
>
> A. Connie herself.
>
> Q. And did she tell you how it was that she fell?
>
> A. She – no, not really. I know that she had tripped on that, on that walkway. Because there is because the walkway actually has a slight grade.

(Plaintiff's Opposition, Declaration of Deon Goldschmidt, Exhibit C.) This testimony fails to show that Stewart had notice of any inadequacy in the *lighting* on the stairs, as opposed to a "slight grade" in the walkway. (*Jacobs, supra,* 14 Cal.App.5th at p. 444 ["A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion."].)

Raposas also asserts that notice is relevant only to the issue of duty and that Stewart concedes that she had a duty to provide adequate lighting. But Stewart has argued in her motion that she had no notice of any inadequacy or issue with the porch light, whether on or off. Further, Raposas's cited authority, *Nicholson v. Los Angeles* (1936) 5 Cal.2d 361, 367, does not hold or even suggest that the question of notice becomes irrelevant when duty is conceded.

Accordingly, the court concludes that Stewart has met her burden at the first step of the summary judgment analysis and that Raposas has failed to show that there is a triable issue of

fact at the second step as to whether Stewart had notice and sufficient time to cure any dangerous condition with respect to the lighting of the stairs where the incident occurred.

The court GRANTS the motion for summary judgment.

D. Evidentiary Objections and Stewart's Request for Judicial Notice

Both parties make evidentiary objections in their responses to the separate statements. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).) Here, Stewart does not object to the one material fact of Raposas's that the court has relied on. With respect to Stewart's UMFs, to the extent Raposas has objected to any UMFs upon which the court has relied, the court OVERRULES Raposas's objections, which are based solely on the UMFs being "argumentative." The court declines to rule on any other evidentiary objections.

Stewart also requests judicial notice of the complaint. While such a request is unnecessary, as the court is required to consider the complaint in ruling on the motion, (see *Paul v. Patton* (2015) 235 Cal.App.4th 1088, 1091, fn.1 [denying as unnecessary a request for judicial notice of pleading under review on demurrer], the court grants the unopposed request for judicial notice. (See Evid. Code, § 452, subd. (d).)

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